88-723

Supreme Court, U.S.
FILED
OCT 26 1988
JOSEPH F. SPANIOL, JR.
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No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARK JENKINS,

Petitioner,

v.

GEORGIA POWER COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals so err in its application of stater law as to call for the exercise of this Court's supervisory jurisdiction?

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REPORT OF OPINIONS BELOW

The opinion of the district court on motion for judgment notwithstanding the verdict is reported at 668 F.Supp. 1574 (N.D.Ga. 1987). The opinion of the Court of Appeals appears at 849 F.2d 507 (11th Cir. 1988).

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals reversing the trial court was entered on July 11, 1988. Petitioner filed a timely motion for rehearing, which was denied on August 30, 1988. This petition is timely filed, invoking the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

This appeal requires the interpretation of no constitutional, statutory or regulatory provision.

STATEMENT OF THE CASE

Plaintiff-Petitioner was injured painting power line support towers belonging to Defendant-Respondent. He was working for an independent contractor hired by Respondent. By the terms of the service contract, the power lines remained charged during painting. Plaintiff was entirely inexperienced in working around high-tension lines. His supervisor called out to ask him how far he was working from the nearest power line. Thinking he was being asked about the nearest line below him, Plaintiff raised his arm to demonstrate the distance. Plaintiff either touched or created an arc with an uninsulated overhead line carrying 115,000 volts of electricity. Plaintiff suffered severe

burns over 50% of his body, and is permanently disfigured.

Plaintiff commenced suit in the United States District Court for the Northern District of Georgia, invoking that court's diversity jurisdiction, 28 U.S.C. § 1332(a).[1] The trial court charged that the jury might find Defendant liable on a failure to warn theory, but refused requested charges on the power company's nondelegable duty as to inherently dangerous activities. Plaintiff won a jury verdict. The trial court, relying upon the single theory of failure to warn, denied Defendant's motion for judgment notwithstanding the verdict. The Court of Appeals reversed, finding no factual support in the record for a duty to warn. The Court of Appeals affirmed the trial court's rejection of the nondelegable duty alternative theory urged by Plaintiff.

REASONS FOR GRANTING WRIT

This petition invokes the certiorari power of this Court where the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 17.1(a) of this Court. The courts below have committed no ordinary error of law, but one crying out for the exercise of this Court's extraordinary powers.

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[1] Keeler and Long, Inc., was an additional defendent when this case was originally filed.

ARGUMENT

I. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWERS TO REQUIRE RECONSIDERATION ON THE MERITS.

Petitioner does not expect this Court to engage in its own inquiry into state law. This Court justifiably reserves its plenary jurisdiction for issues of federal import. *Cf. Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875). The lower court's error here is so striking as to require vacation and remand for reconsideration.

The circuit court held that hypertension lines are not "inherently dangerous" for purposes of establishing a nondelegable duty toward employees of an independent contractor working around 115,000 volts of electricity. The trial court and the court of appeals relied without discussion upon a single case, *Georgia Power Co. v. Gillespie*, 49 Ga.App. 788, 176 S.E.2d 786 (1934). *Gillespie* is utterly inapplicable, both as a matter of fact and as a matter of law, to the instant case.

In *Gillespie*, the independent contractor-employer had full contractual authority to cut the current running through wires near which the plaintiff worked. 49 Ga.App. at 791. Of course, there is nothing inherently dangerous about a dead power line! Georgia Power's live-wire requirement during the work in this case makes all the difference. The courts below failed to acknowledge this crucial distinction.

The courts below also failed to acknowledge that *Gillespie* has been eroded, even if *Gillespie* can be read to hold that live electric wires are not inherently dangerous. Since *Gillespie*, the Georgia Court of Appeals has redefined the entire doctrine:

> [W]here the work is inherently dangerous, *or involves peculiar risk of bodily harm to others unless special precautions are taken*, this duty is nondelegable and the employer is liable for negligence of the contractor which produces a result falling short of what it was the employer's duty to attain.

Community Gas Co. v. Williams, 87 Ga.App. 68, 78, 73 S.E.2d 119 (1952) [emphasis added] (bottled gas is inherently dangerous). The circuit court below made no attempt to assess the inherent dangerousness of painting near live wires against the new *Williams* standard of "peculiar risk [absent] special precautions."

The circuit court's blind reliance upon *Gillespie* despite both its factual limitations and subsequent changes in Georgia's "inherently dangerous" standard justifies this Court's remand for reconsideration.

II. IN THE ALTERNATIVE, THIS COURT SHOULD CERTIFY OR REMAND WITH DIRECTIONS TO CERTIFY.

The Georgia Supreme Court has authority to decide questions of Georgia law certified to it by this Court and the federal courts of appeals.

> When it shall appear to the Supreme Court of the United States, [or] to any Circuit Court of Appeals of the United States . . . that there are involved in any proceeding before it questions or propositions of the laws of this State which are determinative of said cause and there are no clear controlling precedents in the appellate court decisions of this State, such federal appellate court may certify such questions or propositions of the laws

> of Georgia to this court for instructions concerning such questions or propositions.

Georgia Supreme Court Rule 37(a). Plaintiff suggests that the instant case is peculiarly appropriate for certification. The central issue is clearly controlled by the Georgia law of inherent dangerousness, whatever that law may be. The authority of *Gillespie* is undercut by *Williams*, leaving no clear controlling precedent. Both are decisions of the Court of Appeals. Direction from the Supreme Court would be most helpful in defining the scope of Defendant's nondelegable duty.[2]

Should this Court choose to certify directly, Plaintiff suggests that an appropriate form of question would be:

> Does painting in close proximity to uninsulated, high-tension wires carrying 115,000 volts of electricity constitute inherently dangerous work imposing a nondelegable duty toward workers upon the employer of an independent contractor?

The more sensible procedure, however, may be for this Court to remand to the Eleventh Circuit with directions to that Court to certify to the Georgia Supreme Court.

CONCLUSION

The circuit court relied upon a single fifty-year-old Georgia Court of Appeals case in rejecting Plaintiff's argument that his work was inherently dangerous. In

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[2] Plaintiff did not ask the Eleventh Circuit to certify, but did call its attention to that procedure by his extensive discussion of *United States v. Aretz*, 248 Ga. 19, 280 S.E.2d 345 (1981) (on certified questions).

so doing, the Court below ignored the factual irrelevance of that decision, and its erosion by a subsequent opinion of the same court.

This case calls for the exercise of this Court's extraordinary supervisory powers, either to vacate and remand for reconsideration, or to obtain certification of the key issue to the Georgia Supreme Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT.

No. 87-8755.

Mark JENKINS,
Plaintiff-Appellee-Cross-Appellant,

v.

GEORGIA POWER COMPANY,
Defendant-Appellant-Cross-Appellee.

July 11, 1988

Appeals from the United States District Court for the Northern District of Georgia.

Before JOHNSON, Circuit Judge, HENDERSON*, Senior Circuit Judge, and PITTMAN**, Senior District Judge.

PITTMAN, Senior District Judge:

This diversity case arises from a personal injury suit brought in the Northern District of Georgia by plaintiff Mark Jenkins against defendant Georgia Power, Inc. (Georgia Power). The jury returned a verdict in favor of the plaintiff in the sum of $515,000.00. Thereafter, defendant Georgia Power moved for a judgment notwithstanding the verdict or in the alternative for a new trial.

See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama sitting by designation.

The district court denied both of these motions, 668 F.Supp. 1574, whereupon the defendant appealed to this court. We reverse the district court's decision.

I. Facts

The plaintiff, Mark Jenkins, was severely injured while painting a high voltage transmission tower owned by defendant, Georgia Power. At the time of his injury, plaintiff was employed by Nash Industrial Contractors, Inc. (Nash Contractors). Jenkins was sitting on a cross beam of the tower painting when the injury occurred. There were 115,000 volt power lines both directly above and below Jenkins. In response to being asked by the crew foreman how close he was from the electrical lines, Jenkins, assuming that the foreman meant the power lines beneath him, raised his arm to indicate the distance and either touched an uninsulated wire or came close enough to allow the electrical current to arc from the line to his body. The contact caused an electrical flash and explosion, resulting in severe burns over 50 percent of Jenkins' body.

It is undisputed that Nash Contractors was an independent contractor hired by Georgia Power to paint 100 high voltage electrical transmission towers. Evidence indicated that Nash Contractors was awarded the job based upon a competitive bid system. The evidence was that while Nash Contractors had no previous experience painting transmission towers, both Gary Nash, the owner of Nash Contractors, and Billy Crump, crew foreman, had prior experience working with electrical lines, due to their previous employment with Georgia Power. Gary Nash had worked for Georgia Power for about 21 years when he left in 1978. The last eight years Nash worked for Georgia Power, he spent on a high line crew working with energized lines ranging from 46,000 to 235,000 volts.

Both Nash Contractors and Georgia Power mutually understood that the towers supported electrical lines car-

rying 115,000 volts and that they would remain energized while the towers were being painted. Additionally, the written contract between Nash Contractors and Georgia Power provided that all work would be performed in accordance with the latest safety procedures set forth by the Occupational Safety and Health Administration (OSHA).

On November 8, 1983, plaintiff was telephoned by Gary Nash, who offered plaintiff a job painting towers. Later that same morning, Gary Nash went over to plaintiff's home and told plaintiff that a work crew would be by to pick him up and take him to the work site. Plaintiff could not recall whether Mr. Nash had given him any safety instructions concerning how to work around electrical lines.

Plaintiff was then picked up by Nash's crew and transported to the work site. Plaintiff testified that at no time was he given any instructions concerning the proper means of painting around electrical lines, other than being told "don't touch the wires." Plaintiff also testified that no one told him of the need to remain a certain distance away from the electrical lines.[1] Plaintiff admitted that he knew electrical lines were dangerous and that he could be injured by touching them.

Plaintiff brought suit alleging Georgia Power was negligent in failing to properly supervise, protect, require adequate safety training and in failing to warn plaintiff of unknown dangers. At the close of plaintiff's evidence, Georgia Power moved for a directed verdict on the grounds that plaintiff had failed to establish its prima facie case. The district court denied this motion and its subsequent renewal at the close of all evidence. Thereafter, the district

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[1] This testimony directly contradicts that of Messrs. Crump, Benn and Gibbs, each of whom testified that plaintiff was told not to get too close to the power line. *See*, R4 at 140-41; 159-60; 169.

court also denied Georgia Power's motion for judgment N.O.V. and for a new trial.

II. Discussion

At both the district court level and again on the appellate level, plaintiff argued that Georgia Power could be held liable on the theory that the work to be performed was ultra-hazardous in nature. *See*, O.C.G.A. § 51-2-5(2) (1982). This argument was rejected by the district court and is, likewise, rejected by this court in light of *Georgia Power Co. v. Gillespie*, 49 Ga.App. 788, 176 S.E. 786 (1934).

In *Gillespie*, the Georgia Court of Appeals stated

> [w]e are unwilling to hold that electricity is a substance so inherently dangerous that a power company may not contract for the building of power lines with an independent contractor and absolve itself from liability for an injury which occurs solely because of the negligence of such independent contractor in the doing of the work.

49 Ga.App. at 794, 176 S.E. at 789. Thus, plaintiff's reliance upon O.C.G.A. § 51-2-5(2) providing for liability when the work is "dangerous to others however carefully performed," is misplaced.

The real question that remains in this case is whether Georgia Power, as landowner, had a duty to warn Nash Contractors of the propensity of electricity to arc. Under Georgia law, an owner who hires an independent contractor to work on his property owes a duty to give warning to the contractor who is without actual or constructive knowledge of the danger which could not be discovered in the exercise of ordinary care. *Apostol-Athanasiou v. White*, 176 Ga.App. 178, 179, 335 S.E.2d 442, 443 (1985); *Amear v. Hall*, 164 Ga.App. 163, 166, 296 S.E.2d 611, 614 (1982). If the contractor or invitee knows of the danger or hazard,

the landowner has no duty to warn because the invitee's knowledge is equal to that of the owner. *Pound v. Augusta National,* 158 Ga.App. 166, 168, 279 S.E.2d 342, 344-45 (1981); *See, e.g., Amear,* 164 Ga.App. at 166, 296 S.E.2d at 614; *Apostol-Athanasiou,* 176 Ga.App. at 179, 335 S.E.2d at 443. A landowner's duty to warn of non-obvious hazards may be discharged by warning the invitee of the existence of such danger. It is not necessary that an owner warn each individual employee of the danger but may discharge his duty by warning the independent contractor. *Brown v. American Cyanamid and Chemical Corp.,* 372 F.Supp 311, 316-17 (S.D.Ga.1973); *Hodge v. United States,* 310 F.Supp. 1090, 1101 (M.D.Ga.1969), *aff'd,* 424 F.2d 545 (5th Cir. 1970).

The district court determined that there was a viable jury issue as to Nash's knowledge concerning the requisite distance painters should maintain away from the electrical lines to avoid an electrical arc. The trial court found that although Nash was an experienced lineman, his only statement as to the proper working distance was that he "thought" it was three feet. The court determined that under these circumstances, Georgia Power might have been negligent in failing to adequately warn Nash Contractors of the propensity of electrical current to arc and that a person should stay at least 34 inches away from the energized line.

The trial transcript reflects Mr. Nash responded to this question, "What is the distance required from this line to the worker under OSHA's regulation of distance?" by stating, "Three feet is what I thought it was." To another question, Nash stated he knew from experience that electrical wires will arc to an object some distance away. The evidence is clear that Nash knew that electricity would arc and that a person should stay away from the lines. We disagree with the trial court's determination that there was a viable jury issue.

The test for determining whether a court properly denied a motion for judgment N.O.V., is the same as that for determining whether a motion for directed verdict should be granted. *Grandison v. Smith*, 779 F.2d 637, 640 (11th Cir.1986), *reh'g denied*, 786 F.2d 1119 (11th Cir.1986) (en banc). This court is obligated to consider all of the evidence, not just the evidence which supports the non-moving party's case, in the light most favorable to the non-moving party. The case should be left with the jury's determination, if the evidence is of such quality or weight that reasonable and fair minded men could reach opposite or different conclusions. *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir.1969) (en banc). *See, e.g., Grandison*, 779 F.2d at 640; *Walden v. United States Steel Corp.*, 759 F.2d 834, 837 (11th Cir.1985).

In applying this standard to the facts of this case, it is apparent that although Nash may not have known the exact distance that a person should maintain away from the lines, he did know that electricity would arc. Since Nash knew that electricity would arc, there was no duty on the part of Georgia Power to inform him of this allegedly non-obvious danger. *See, e.g., Apostol-Athanasiou*, 176 Ga.App. at 179, 335 S.E.2d at 443; *Amear*, 164 Ga.App. at 166, 296 S.E.2d at 614; *Pound*, 158 Ga.App. at 168, 279 S.E.2d at 344-45.

There is ample evidence throughout the record which indicates Nash Contractors' knowledge of the propensity of electricity to arc, not least important of which is Gary Nash's own testimony that he knew electricity would arc over to an object "some distance" away from an electrical line. R4 at 121-22. Nash also testified that at the start of a job he would demonstrate the proper and safe way to paint towers, constantly reminding his workers of the danger in getting too close to the lines. R4 at 120-21. Testimony was also had from a Mr. Alford Benn, III, who worked for Nash Contractors. Mr. Benn testified that both Gary Nash and Billy Crump, who was the crew foreman,

had told him that electricity would arc under certain conditions. R4 at 143, 154.

Testimony was also received from Mr. William Croker, a Georgia Power employee. Croker testified that he had worked with Nash at Georgia Power subsequent to the enactment of OSHA. Based upon this previous work experience, Croker believed Nash to be thoroughly familiar with the working clearances required by OSHA for 115,000 volt lines. In fact, Croker believed that Nash's practical experience in working around electricity exceeded that of his own. R6 at 486, 492-94.

In reviewing this testimony, this court holds as a matter of law that reasonable and fair minded men could not reach different conclusions as to whether Nash Contractors and its supervisors knew that electricity would arc. The evidence clearly shows that Gary Nash possessed such knowledge. Accordingly, Georgia Power was under no duty to warn either Nash Contractors or Jenkins of the propensity for electricity to arc. *Pound*, 158 Ga.App. at 168, 279 S.E.2d at 344; *Brown*, 372 F.Supp. at 316-17; *Hodge*, 310 F.Supp. at 1101.

Since Georgia Power had no duty to warn either Nash Contractors or Jenkins, there can be no liability on the part of Georgia Power upon which a verdict could be based. *See, Galanti v. United States*, 709 F.2d 706 (11th Cir.1983), *reh'g denied*, 716 F.2d 914 (11th Cir.1983), *cert. denied*, 465 U.S. 1024, 104 S.Ct. 1279, 79 L.Ed.2d 683 (1984) (existence of a legal duty essential to recovery for negligence). The district court, therefore, erred in denying Georgia Power's motion for directed verdict and for judgment notwithstanding the verdict.

III. Conclusion

Based upon the foregoing reasons, we hold that the propensity of electricity to arc was not a non-obvious danger of which Nash Contractors had no knowledge. Since

Gary Nash was aware of the danger, Georgia Power had no duty to warn either Nash Contractors or Jenkins. Absent such a duty, Georgia Power could not be held liable for negligence. Accordingly, the judgment of the district court is REVERSED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL NO. C85-4251

MARK JENKINS

vs.

GEORGIA POWER COMPANY, INC.

Filed AUG 14 1987

ORDER

This diversity action alleging negligence is before the court on Defendant Georgia Power Company's motion for judgment notwithstanding the verdict or alternatively for a new trial. The jury returned a verdict for the Plaintiff in the sum of $515,000.

On November 8, 1983, Plaintiff Mark Jenkins was severely injured while painting a transmission tower owned by Defendant Georgia Power Company, Inc. (Georgia Power), and situated on an easement belonging to Georgia Power. The injury occurred when Jenkins either touched an uninsulated line carrying 115,000 volts of electricity, or came close enough to permit the electric current to arc from the line to his body.

The paint work was being done for Georgia Power by Nash Industrial Contractors, Inc. (Nash Contractors). It is undisputed that Nash Contractors was an independent contractor, and Plaintiff Jenkins was its employee. Georgia Power and Nash Contractors mutually understood that the

100 transmission towers which were to be painted carried 15,000 volts of electricity in uninsulated lines, and that the lines would remain energized during painting. The written contract between the parties generally stipulated that all work would be performed in accordance with safety regulations of the Occupational Safety and Health Administration.

Plaintiff Jenkins received a telephone call from Gary Nash, the owner of Nash Contractors, on the morning of November 8, 1983. At that time, Jenkins was 20 years old and was intermittently employed doing various jobs. Nash inquired whether Jenkins would be interested in doing some painting. Jenkins indicated he would. Nash then came by Jenkins' home and informed him that a work crew would be coming by to pick him up to take him to the job site. Jenkins did not recall Nash giving him any information concerning the fact that the job involved painting transmission towers, or that he would be working in close proximity to high voltage wires.

Jenkins was then picked up by Billy Neal Crump, a foreman for Nash Contractors. Crump took Jenkins and others to the tower which would be painted that day. According to Jenkins, Crump simply told him not to touch the wires, which were energized. Jenkins admitted that based on his own knowledge of electricity, he knew it would be very dangerous to touch an energized electrical wire.

Crump explained to Jenkins how to apply the paint. Jenkins was to dip a paint mitt, which would be worn on one hand, into a paint bucket and apply the paint by sliding his mitted hand along the arms of the tower. Jenkins testified that no one gave him any instructions concerning the necessity for staying any particular distance from the wires. The paint was an oil-base formula which has combustible and conductive properties.

Jenkins' injury occurred as he was sitting out on an arm of the tower near the transmission lines. The foreman, Crump, called up from the ground and asked Jenkins how close he was getting to the wires. Jenkins, assuming that Crump meant the wires below his feet, raised his mitted hand above his head in an effort to illustrate the distance. Jenkins' raised hand either touched the line above his head or came close enough to cause the electricity to arc onto the mitt. The contact of the electricity caused a flash and an explosion. Jenkins' clothes caught on fire, causing him severe burns with resulting disfigurement.

The evidence showed that Nash Contractors was awarded the painting job as a result of a competitive bid process. The evidence further showed that from 1957 to 1978, Gary Nash was an employee of Georgia Power Company. From about 1970-1978, Nash was a high line crewman. In this capacity, he worked on high voltage transmission lines. William Croker, a Georgia Power employee, testified that he had worked with Nash on an inspection project involving high voltage wires "quite a few years back." This was while Nash was still with Georgia Power, but after OSHA had been enacted. At this time, he and Nash had discussed the working distance clearances required on various high voltage lines. Croker testified in essence that he felt, based on that experience, that Nash was quite knowledgeable about OSHA safety requirements. In fact, he felt Nash's practical experience in working with high voltage lines exceeded his own.

Gary Nash testified as follows on cross examination by Jenkins' attorney:

> Q. Did you have the requirements by the Occupational Safety Work and Health Act of 1970, associated rules and regulations, all applicable state and local safety and sanitary laws, regulations, and ordinances? Do you know what those

laws were that were applicable to your work out there on those towers?

A. Yes, sir, some of them, but I didn't know all of them, no, sir.

Q. Tell me the ones you know.

A. I knew the footage on what OSHA required on different voltages.

Q. What is the distance required from this line to the worker under OSHA regulations of distance?

A. Three feet is what I thought it was.

Nash further testified as following on examination by Georgia Power's counsel:

Q. Mr. Nash, how much of your experience with Georgia Power Company dealt with working on and around transmission towers such as the one involved in this case?

A. You mean time limit?

Q. About how many years?

A. It would be hard to say, Mr. Bob. The power company has so many different structures. In the last eight years, I was on strictly a high line crew and, of course, they have got many different structures that carry 115,000 volt lines.

Billy Neal Crump, Nash's foreman, gave the following testimony in response to questions from Georgia Power's counsel:

Q. In your opinion, how close would you have to get to an energized conductor? What would be the closest point in order to paint the entire tower?

A. Well, you don't have a rule of thumb. I told them not to get any closer than the string of insulators.

Q. And this (indicating) would be the string of insulators?

A. Yes.

Q. And these tin insulators are what you are talking about?

A. Yes.

Q. Do you know how long that is?

A. No, sir.

Q. About three feet?

A. Well, that is about—my estimate is about three feet.

Q. Did you tell this to Mr. Jenkins?

A. I think so, yes, sir.

Q. You said don't get any closer than the string of insulators?

A. Yes.

Q. And he could have done that, could have painted and not come closer than that?

A. Yes, sir, I think so.

Q. Can you say whether Mr. Jenkins when he raised his right hand up actually touched the conductor?

A. I can't say for sure.

Q. Could you say how close be came?

A. I would say he came pretty close.

Q. What do you mean by pretty close?

A. Well, I would say within two or three inches.

The trial testimony established that OSHA regulations require a minimum clearance of 34 inches with respect to a 115,000 volt line. The National Electric Safety Code, 1981 edition, requires a minimum clearance of 30 inches.

The court's charge, in relevant part, was as follows:

Now, in order to recover damages from the Defendant, Mr. Jenkins must prove the following:

First, that Georgia Power Company breached a duty of care to him or, in other words, was negligent as that term is legally defined.

Secondly, that Georgia Power's negligence was a legal or proximate cause of his injuries.

And three, damages.

Now, with respect to the element of negligence in this case, I charge you that Georgia Power Company as owner of the transmission facility had a duty to warn Nash Industrial Contractors, Inc. of any nonobvious hazards inherent in the work Nash was to do on the towers which were known to Georgia Power Company.

However, Georgia Power had no duty to warn of obvious hazards or of any hazards which it knew Nash understood and appreciated. Because Nash was an independent contractor, the duty to warn of nonobvious hazards did not extend to Nash's individual employees such as Mr. Jenkins.

Thus, Georgia Power's duty under the law was solely to make sure that Nash understood and appreciated those dangers inherent in painting the transmission towers which were not of an obvious nature but which were known to Georgia Power Company, and the legal theory behind that

principle of law is the expectation that Nash would then undertake to warn his employees of these nonobvious dangers.

I charge you that Plaintiff is not entitled to recover merely on a showing that his employer, Nash, was negligent. This is because, as I stated, Nash was an independent contractor. Rather, it is necessary for Plaintiff to show that the incident in question was proximately or legally caused by Georgia Power's negligence under the principles I have just outlined.

If the jury were to determine that Georgia Power was negligent in the manner described, you would then determine whether any such negligence on Georgia Power's part was the proximate or legal cause of Plaintiff's damages. TR. 524-526.

I charge you that negligence is the proximate or legal cause of damage if it directly and in natural and continuous sequence produces or contributes substantially to producing damage so it can reasonably be said that except for the negligence, the loss, injury, or damage would not have occurred.

Negligence may be a legal cause of damage even though it operates in combination with the act of another party, some natural cause, or some other cause if such other cause occurs at the same time as the negligence and if the negligence contributes substantially to producing the damage.

I charge you that negligence cannot be inferred from the mere happening of an event. In other words, you may not find that Georgia Power was negligent merely because the incident in question happened.

Now, Ladies and Gentlemen, if you were to find that the Defendant was not negligent in the manner I described, or if you were to find that any negligence of the Defendant did not proximately cause the Plaintiff's inju-

ries, then you would return a verdict for the Defendant and you would proceed no further in your deliberations.

In its motion for judgment notwithstanding the verdict or in the alternative for a new trial, Georgia Power argues first that it is entitled to judgment in its favor because it had no duty to warn Nash, because he was fully aware of dangers inherent in doing the work. In support of its alternative request for a new trial, Georgia Power argues that the evidence was legally insufficient, and further that the court erred in failing to charge on the doctrine of assumption of risk, in failing to charge the jury that Georgia Power had no duty to the Plaintiff with respect to the condition of the tower; in failing to charge that Plaintiff was obliged to select a safe way of doing the work, if a safe method existed; in failing to charge that Georgia Power would not be liable if Plaintiff's injuries were due to the intervening negligence of Nash; in charging the jury on the principle of nonobvious hazards, when there were none under the evidence.

In Georgia, an owner and occupier of land has a duty to invitees to give warning or use ordinary care to provide protection against latent dangers known to the owner but not the invitees.[1] *Amear v. Hall,* 164 Ga. App. 163, 166 (1982). The basis of the owner's liability is his superior knowledge of the danger. *Id.* at 168. An invitee's actual knowledge of a latent defect or hazard vitiates the owner's duty to warn. *Apostol-Athanasiou v. White,* 176 Ga. App. 178, 179 (1985); *Tect Construction Company, Inc. v. Frymyer,* 146 Ga. App. 300, 302 (1978).

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[1] The court rejected Plaintiff's argument that Georgia Power is liable for Nash's negligence under O.C.G.A. §51-2-5(2) (employer liable for contractor's negligence when work inherently dangerous), relying on *Georgia Power Company v. Gillespie,* 49 Ga. App. 788 (1934) (Georgia Power not liable for contractor's negligence while rebuilding power lines in electric plant.)

A landowner's duty to warn of nonobvious hazards on his premises is discharged by warning the contractor who comes onto the premises to perform the work. It is not necessary that the landowner warn individual employees of the contractor. *See Brown v. American Cyanamid and Chemical Corporation,* 372 F. Supp. 311 (S.D. Ga. 1973); *Hodge v. United States,* 310 F. Supp. 1090 (M.D. Ga. 1969), *aff'd,* 424 F.2d 545 (5th Cir. 1970). *See also Whitlow v. Seaboard Airline Railroad Company,* 222 F.2d 57 (4th Cir. 1955) (interpreting Georgia law not to require warnings to individual employees of an independent contractor).

Applying the foregoing legal principles, the court found that the only respect in which Georgia Power might be deemed negligent under the evidence was in failing to adequately warn the contractor of the propensity of high voltage electrical current to arc and that a person should keep at least 34 inches from the energized line. Arguably, the possibility of an electric arc is a nonobvious hazard.

The court finds that there was a viable jury issue as to whether Jenkins' injuries resulted from Georgia Power's failure to specifically warn Nash that the painters should stay at least 34 inches from the lines because of the danger of an electrical arc.[2] The evidence of the extent of Nash's knowledge on this subject was not clear enough to take this issue from the jury. While Nash was an experienced lineman, and had worked around high voltage lines for a considerable time while employed at Georgia Power, his only statement to the jury concerning the safe working distance was that he "thought" it was three feet. Also, the extent of Nash's experience working on transmission towers similar to the one involved in this case was not entirely clear. Neither was it clear that the working conditions or protective equipment in use when Nash worked on high voltage transmission lines were the same as in

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[2] Possibly, the fact that oil-base paint was being used meant that even a 34 inch clearance was not adequate.

the instant case. Therefore, it cannot be said that as a matter of law that Georgia Power had no duty to warn. The jury was entitled to consider whether the lack of specific warning was a substantial factor in causing Jenkins' injuries.

Turning to Georgia Power's motion for a new trial, the court finds that no prejudicial error was committed. The evidence was legally sufficient, in that Georgia Power indisputably did not communicate with Nash concerning hazards inherent to doing the work; the jury could have determined that Nash was not sufficiently knowledgeable about the required working distance. The jury could further have found that Jenkins' injury occurred when he raised his paint mitt close enough to the wire to cause the electricity to arc onto the mitt. A charge on the doctrine of assumption of risk was inappropriate because there was no evidence from which the jury could have found that Jenkins recognized the risk involved in placing his hand in proximity to the wire, and there was no evidence from which the jury could have found that Jenkins intentionally touched the wire. Georgia Power's charge request to the effect that it had no duty to Jenkins because it had surrendered possession of the tower was not correct, as Georgia Power had not deenergized the lines. It was not necessary to give Georgia Power's requested charge to the effect that Plaintiff was obliged to select a safe way of doing the work if a safe method existed because the relevant legal principles were adequately covered by the court's charge on contributory and comparative negligence.

Next, Georgia Power's request to charge on intervening negligence was not required to be given, as the legal principles contained therein were adequately covered by the court's charge on proximate cause. Finally, the court rejects Georgia Power's argument that it erred in charging the jury on duty to warn of nonobvious hazards. The court finds that the arcing phenomenon mentioned previously was a nonobvious hazard.

For the foregoing reasons, Georgia Power's motion for judgment notwithstanding the verdict is DENIED; said Defendant's motion for a new trial is hereby DENIED.

SO ORDERED, this 14 day of August, 1987.

/s/Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 87-8755

D.C. Docket No. 85-4251

MARK JENKINS,
Plaintiff-Appellee, Cross-Appellant,

versus

GEORGIA POWER COMPANY, INC.,
Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court for the Northern District of Georgia

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ISSUED AS MANDATE: SEP 15 1988

Filed SEP 20 1988

Before JOHNSON, Circuit Judge, HENDERSON*, Senior Circuit Judge, and PITTMAN**, Senior District Judge.

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*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED;

It is further ordered that plaintiff-appellee, cross-appellant pay to defendant-appellant, cross-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: July 11, 1988

For the Court: Miguel J. Cortez, Clerk

By /s/ ????? ????? ?????
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 87-8755

MARK JENKINS,
Plaintiff-Appellee, Cross-Appellant,

versus

GEORGIA POWER COMPANY, INC.,
Defendant-Appellant. Cross-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

Filed Aug 30 1988

ON PETITION(S) FOR REHEARING
(AUG 30 1988)

BEFORE: JOHNSON, Circuit Judge, HENDERSON*, Senior Circuit Judge, and PITTMAN**, Senior District Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellee/Cross-Appellant, Mark Jenkins is denied.

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*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson
United States Circuit Judge

APPENDIX D

PLAINTIFF'S REQUEST TO CHARGE #1

Should you find that the work done by the contractor is inherently dangerous or involves a peculiar risk of bodily harm to others unless special precautions are taken, then I charge you that this duty is nondelegable and the employer, that is, Georgia Power Company, Inc., is liable for negligence of the contractor, Nash Industrial Contractors, Inc., which produces a result falling short of what was the employer's duty to attain.

When the Georgia Power Company procured the services of Nash Industrial Contractors to perform an act which, according to previous knowledge and experience, is in its nature dangerous to others however carefully performed, the negligence of the independent contractor proximately resulting in the injuries and occurring in the course of the execution of the act which he was employed to perform is the responsibility of and imputable to Georgia Power Company. The duty on the part of such employer (Georgia Power Company) to exercise ordinary care to prevent injury to others is nondelegable. *Community Gas Co. v. Williams et al., Hamilton Gas Co. Inc. v. Williams et al.,* 87 Ga. App. 68.

PLAINTIFF'S REQUEST TO CHARGE #5
LIABILITY FOR NEGLIGENCE OF CONTRACTOR

An employer is liable for the negligence of a contractor:

"(2) If, according to the employer's previous knowledge and experience, the work to be done is in its nature dangerous to others however carefully performed;"

O.C.G.A. §51-2-5.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. C85-4251-A

VOLUME 4
FEBRUARY 6 & 9, 1987

MARK JENKINS,

Plaintiff,

-vs-

GEORGIA POWER COMPANY, AND KEELER & LONG, INC.,
Defendants.

PROCEEDINGS

THE COURT: ANY EXCEPTIONS TO THE CHARGE?

MR. LONG: YES. WE EXCEPT TO YOU NOT GIVING CHARGE NUMBER 1 OF THE PLAINTIFF ON THE BASIS THAT THIS WOULD HAVE A NONCONTRIBUTING CAUSE OF PLAINTIFF'S INJURY RESULTING FROM THE NEGLIGENCE OF NASH INDUSTRIAL CONTRACTORS WHICH IN MY CONTENTION WOULD BE IMPUTABLE TO GEORGIA POWER COMPANY ....

PLAINTIFF EXCEPTS TO THE FAILURE OF THE COURT TO GIVE CHARGE NUMBER 5. PLAINTIFF EXCEPTS AND CONTENDS THAT THIS STATUTE IS APPLICABLE HERE. THIS PROPERTY WAS OWNED BY GEORGIA POWER COMPANY. IT WAS BEING USED TO CONVEY AND TO TRANSMIT ELECTRICAL POWER, AND THAT WAS UNDER THE CONTROL OF

GEORGIA POWER COMPANY, AND IT WAS A DANGEROUS PLACE TO WORK AND THE GEORGIA POWER COMPANY KNEW IT. IT WAS INHERENTLY DANGEROUS, AND THE TOTAL DANGER WAS NOT TRANSMITTED TO MARK JENKINS.

Page 533, lines 19-25 and page 535, lines 10-17.

Supreme Court, U.S.
FILED
NOV 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-723

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARK JENKINS,

Petitioner,

v.

GEORGIA POWER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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10 pp

QUESTION PRESENTED

Is a question of state tort law involving no federal constitutional issues which has been decided by the highest state court in which a decision could be had as of right of sufficient importance to warrant review by this Court?

LIST OF AFFILIATED CORPORATIONS

Respondent Georgia Power Company is a wholly owned subsidiary of The Southern Company, a publicly held corporation which is traded on the New York Stock Exchange.

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IN THE

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OCTOBER TERM, 1988

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GEORGIA POWER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Georgia Power Company respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 849 F.2d 507 (11th Cir. 1988).

JURISDICTION

Invoking federal jurisdiction based upon diversity of citizenship pursuant to 28 U.S.C. § 1332, the petitioner brought this suit alleging negligence in connection with a personal injury in the Northern District of Georgia, Atlanta Division. The disposition of this matter in the Northern

District and the Eleventh Circuit is set forth in the petition for a writ of certiorari.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondent respectfully directs the Court's attention to the statement of the facts in the Eleventh Circuit's opinion, which it incorporates herein by reference, for an accurate statement of all of the facts material to consideration of the question presented.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE DISTRICT AND CIRCUIT COURTS CORRECTLY HELD THAT ELECTRICITY IS NOT AN ULTRA-HAZARDOUS SUBSTANCE UNDER GEORGIA LAW.

The sole Question Presented in the petition (p. i) is whether the Eleventh Circuit so erred in its application of Georgia law that this Court's supervisory jurisdiction is called for. The answer to this question is no, because the Eleventh Circuit properly followed and applied state law in this diversity case in accordance with the principle of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

The courts below recognized that Georgia tort law holds that electricity is not so ultra-hazardous a substance as to automatically implicate the inherently dangerous work doctrine. In *Georgia Power Co. v. Gillespie*, 49 Ga. App. 788, 794, 176 S.E. 786 (1934), the Georgia Court of Appeals held, "[w]e are unwilling to hold that electricity is a substance so inherently dangerous that a power company may not contract for the building of power lines with an independent contractor

and absolve itself from liability for an injury which occurs solely because of the negligence of such independent contractor in the doing of the work." The courts below correctly applied this principle to reject petitioner's argument that respondent is liable for the negligence of petitioner's independent contractor employer. *Jenkins v. Georgia Power Co.*, 668 F. Supp. 1574, 1577 n. 1 (N.D. Ga. 1987), *rev'd on other grounds*, 849 F.2d 507, 509 (11th Cir. 1988).

Contrary to Petitioner's representation to this Court, *Gillespie* is not an aberration standing in splendid isolation but rather has been cited and followed by both Georgia courts and federal courts applying Georgia law. *E.g., Horn v. C. L. Osborn Contracting Co.*, 423 F. Supp. 801, 809 (M.D. Ga. 1976), *rev'd on other grounds*, 591 F.2d 318 (5th Cir. 1979); *Hodge v. United States*, 310 F. Supp. 1090, 1101 (M.D. Ga. 1969), *aff'd*, 424 F.2d 545 (5th Cir. 1970); *Allen v. Cooper*, 145 Ga. App. 555, 556, 244 S.E.2d 98 (1978); *Georgia Power Co. v. Maxwell*, 52 Ga. App. 430, 434, 183 S.E. 654 (1935). The case cited by Petitioner as redefining the *Gillespie* doctrine, *Community Gas Co. v. Williams*, 87 Ga. App. 68, 73 S.E.2d 119 (1952), merely distinguishes *Gillespie* and does not overrule it. Since *Williams* was decided, the courts have continued to cite *Gillespie* as support for the principle that an employer is not liable for the torts of his independent contractor where work which is not inherently dangerous of itself becomes dangerous when performed negligently. *E.g., Horn v. C. L. Osborn, supra; Hodge v. United States, supra; Allen v. Cooper, supra.*

There is, accordingly, no basis for the exercise of this Court's extraordinary power of supervision, since the decision below follows clear precedent and this Court generally "accept[s] a reasonable construction of state law by the court of appeals." *Haring v. Prosise*, 462 U.S. 306, 314 n. 8 (1983). Respondent respectfully submits that this is not a case requiring reconsideration on the merits.

II. THIS COURT SHOULD NOT CERTIFY OR REMAND WITH DIRECTIONS TO CERTIFY BECAUSE THE COURTS BELOW APPLIED AND FOLLOWED CLEAR CONTROLLING PRECEDENT.

Federal courts are bound by the decisions of a state's intermediate appellate court unless there is persuasive evidence that the highest state court would rule otherwise. *E.g., Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940); *West v. American T&T Co.*, 311 U.S. 223 (1940). The decision of the Georgia Court of Appeals in *Gillespie* is a controlling precedent by an appellate court which is binding on all Georgia courts except the Supreme Court of Georgia. Article VI, Section V, Paragraph III of the Georgia Constitution of 1983.[1] Because a clear controlling decision by the Georgia Court of Appeals exists, there is no basis for certification under the plain language of Georgia Supreme Court Rule 37(a). See, Petition for Certiorari at 4-5.

Petitioner's assertion that "[t]he authority of *Gillespie* is undercut by *Williams*, leaving no clear controlling precedent" conveniently ignores all those cases following *Gillespie* since *Williams* was decided. Petition for Certiorari at 5. As shown above, *Gillespie* is good law which the Georgia Court of Appeals, the Georgia district courts, the Fifth Circuit Court of Appeals, and the Eleventh Circuit Court of Appeals continue to cite and follow. Hence, no basis exists for certifying the question posed by petitioner to the Georgia Supreme Court inasmuch as a line of authority citing *Gillespie* has considered and decided the issue adversely to petitioner.

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[1] The Georgia Constitution of 1983 provides in relevant part as follows: "The Court of Appeals shall be a court of review and shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other courts by law. The decisions of the Court of Appeals insofar as not in conflict with those of the Supreme Court shall bind all courts except the Supreme Court as precedent."

CONCLUSION

The issue raised by the instant petition presents a question of state tort law which is not of sufficient importance beyond the litigants themselves to warrant review by this Court. The courts below followed an unbroken line of authority and correctly rejected petitioner's argument that his work was inherently dangerous as contrary to the law of Georgia. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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